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MOHAMED'S LEISURE HOLDING (PTY) LTD v SOUTHERN SUN HOTEL INTEREST (PTY) LTD: A PROBE INTO A NEW DISPENSATION OF PACTA SUNT SERVANDA IN THE INTERPRETATION OF CONTRACT

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Abstract

This research aims to explore on the contradicting decisions of the High Court and the Supreme Court of Appeal on several issues of the law, pertaining to whether a term that operates harshly on its own offends against the public policy; whether the relaxation of the pacta sunt servanda in this case would result in the court interfering with the agreement of parties; whether the court can develop the common law by infusing the spirit of Ubuntu and Good faith resulting in the invalidation of a material term i.e., the cancellation clause. This study is centred on the Supreme Court of Appeal decision of Mohamed's Leisure Holdings (Pty) v Southern Sun Hotel Interest (Pty) Ltd.

In essence, this research will articulate on whether the Constitutional abstract values can be used to relax the maxim and to what extent. In essence, my proposed study aims to explore and discuss the change in the position of landlords who wish to rely on strict application of contractual terms and the implication of subsequent and ensuing cases with regards to the application of the doctrine of pacta sunt servanda weighed against the constitutional abstract values of Ubuntu, fairness, reasonableness and the principle of good faith and public policy.

In addition, this dissertation aims to examine whether the constitutional values still have a place in law, specifically in the interpretation of lease contracts. The weighing up of the doctrine of pacta sunt servanda against the principles of Ubuntu, fairness, reasonableness and public policy. Ascertaining whether in certain circumstances, the implementation of the cancellation clause contained in the agreement may manifestly be unreasonable and offend against public policy. Therefore, inevitably discussing whether a clause that insists on compliance with its provisions regardless of the circumstances, which prevented compliance, is unreasonable, unfair and contrary to publicpolicy.

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To god be the glory,

It humbles me to know that I wouldn't have done it on my own therefore I thank everyone who believed in me and encouraged me.

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CHAPTER 1: INTRODUCTION AND PROBLEM STATEMENT

1.1 Introduction

The South African Constitution created a court system in which the constitutional court and the supreme court of appeal are the highest courts in all matters. The Constitution binds all courts in their respective fields of final jurisdiction, resulting in the principle of *stare decisis*.[1] Since the entry into force of the 1996 Constitution the bill of rights represents a value system that requires every rule of contract law that contradicts it to be declared invalid. In the minority judgment of Olivier JA in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*[2] the judge stated that "on the basis of that in the circumstances of the case, principles of *bona fides*, equity or good faith militated against the strict application of established rules of contract between the parties, though such enforcement may be dictated by the strict rules of contract".

It has been established that good faith, reasonableness and fairness do not provide an independent or free-floating basis for interfering with the contractual basis.[3] This study involves the most recent supreme court of appeal decision in the case of *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd.*[4] In this case the doctrine of *pacta sunt servanda* and the privity of a contract was weighed against the constitutional abstract principles of fairness, reasonableness and public policy. In essence it involves the cancellation of a contract of lease on the grounds of default in payment caused by an error on the part of the lessee's bank.

1 Brand "The role of good faith, equity and fairness in the South African law of contract: The influence of common law and the Constitution" 2009 *SALJ* 71.
2 1997 4 SA 302 (SCA).
3 *Brisley v Drotsky* 2002 4 SA 1 (SCA).
4 2018 2 SA 314 (SCA).

1.2 Problem statement

This study aims to analyse the decision of the high court in comparison to that of the supreme court of appeal in relation to the weight of the constitutional abstract values against the doctrine of *pacta sunt servanda* in which the issue in the case concerned was whether, in developing the common law in accordance with section 39(2) of the Constitution, the constitutional values of the concepts of *ubuntu* and fairness dictate that the maxim *pacta sunt servanda* ought to be relaxed.The strict application of this doctrine and the impermissibility of infusing principles of *ubuntu* and good faith in the circumstances of a lease contract formed the basis of the study. The influence of abstract constitutional values on the interpretation of contracts results in the undermining of freedom of contract and legal certainty.

CHAPTER 2: INFLUENCE OF THE LEGISLATIVE REGULATION ON THE CONTRACTUAL RELATONSHIP, PARTICULARLY THE LEASE AGREEMENT

2.1 Application of the Constitution of the Republic of South Africa, 1996 in contractual relationships

In accordance with section 2 of the Constitution of the Republic of South Africa, it has been established that the Constitution is the supreme law of South Africa and as much as all law is subject to it, there is no sacred sphere of commercial contract law. Although the source of the South African law of contract Africa is the common law, considering that constitutional transformation involves the process of furthering social justice, it is also declared in section 39(2) of the Constitution that the common law should be developed in accordance with the spirit, purport and objects of the bill of rights.

This means that contract law, even commercial contract law, must be sensitive to the context of the South African situation, with its attendant socio-economic challenges. Through the medium of indirect development of the common law, the constitutional court

has attempted to convert contract law in line with its own view of contractual justice. This development is also mirrored in a wide array of statutes aimed at ameliorating specific aspects of the law of contract, particularly in sectors where there is inequality of bargaining power, such as employment law, consumer law and the law of residential leases. The legislative and judicial context in which South African commercial contract law operates thus has changed dramatically in its post-apartheid setting.

In the matter of *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* the Supreme Court of Appeal recently considered whether the common law principle of *pacta sunt servanda* should be developed by importing the principles of *ubuntu* and fairness into the law of contract.[5] In the supreme court of appeal case, which is the focal point of this research, the court recently considered whether the common law principle of *pacta sunt servanda* should be developed by importing the principles of *ubuntu* and fairness (practically constitutional values) into the law of contract. Put differently, can one conclude that a hard-hitting contractual term is constitutionally unfair and therefore unenforceable? For legal certainty purposes, it then becomes necessary to explore how legislation that specifically regulates private contractual relationships promotes fairness, because this research will have no impact if it seems to ignore rules, particularly those most relevant to lease agreements.

2.2 Relevant legislation other than the constitution

2.2.1 General

Before the case of *Mohamed's Leisure Holdings* is discussed in detail, a general exposition will be given of statutes that may be relevant to similar cases. These include the Consumer Protection Act[6] and the National Credit Act.[7]

2.2.2 Consumer Protection Act

5 Manolios "*Pacta sunt servanda* v *ubuntu*" 2018 *Without Prejudice* 32.
6 68 of 2008.
7 34 of 2005.

The Consumer Protection Act is not necessarily applicable in this instance because of the monetary requirement set by the Act, namely, an annual asset value in terms of section 5(2)(b) of R2 000 000.[8] The annual turnover of the respondent's hotel division in South Africa runs into millions,[9] which for the year 2017 was R14 000 000, which is the total comprehensive income for the period as reflected in the group's statements in Sun International's audited financial statement of 2017.[10] It is important to consider those lease agreements where the juristic person is within the monetary threshold of R 2 000 000 as per section 5(2)(b) of the act since the case has set a precedent for all subsequent cases involving a similar legal question.

Nevertheless, it is necessary to acknowledge while the act contains provisions that the terms and conditions in a contract must be fair, just and reasonable, this does not necessarily entail that the act provides for all instances conditions that require strict application are to be unreasonable and unfair.[11] The purpose of the act is to "promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection". In terms of the act, the rental of residential property is considered a service, meaning that parties to such agreements need to take cognisance of the provisions thereof.[12]

It is worth noting that a landlord is required to give a tenant between 40 and 80 days' notice either of terminating the agreement or alerting the tenant of any material changes that will be implemented upon the renewal of an agreement.[13] The Consumer Protection Act provides for both administrative and judicial control of unfair contract terms across a broad range of consumer contracts.[14] One of the most emphasised consumer rights is the right to fair, just and reasonable terms and conditions. It is my view that it is prudent

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8 s 5(2)(b) and *Government Gazette* 34181 (1 April 2011).

9 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd* 2017 4 SA 243 (GJ) 30.

10 https://corporate.suninternational.com/content/dam/approved/corporate/investors/results/sun-international-afs-10-april-2018.pdf.

11 Freebody "The effect of the CPA on lease agreement-consumer law" 2016 *Without Prejudice* 22.

12 s 1 of the Consumer Protection Act 68 of 2008.

13 n 9.

14 Sharrock "Judicial control of unfair contract terms: The implications of the Consumer Protection Act" 2010 22 *SA Merc LJ* 297.

for all lessors of residential premises to take note of the Consumer Protection Act when entering into lease agreements, as the consequences of not adhering to the act could be detrimental to the lessor.[15]

Therefore, if parties to a lease agreement fail to adhere to the provisions contained in the Consumer Protection Act, it may result in the lease agreement or a part of it being declared void and unenforceable.[16] It is clear that the act does not leave room for any subjective discretion on the part of the court to establish what may be considered too harsh so as to be unenforceable. It simply refers to the adherence to provisions of the act.

The addition of the Consumer Protection Act to the proprietary law landscape, specifically as far as lease agreements are concerned, has created protection for consumers, in this case tenants, in that it has limited the extent of one-sided lease agreements, which were previously governed by common law. In light of this it is important for property owners and tenants to seek expert legal advice regarding the regulation of their relationship and to protect themselves from abuse and sanctions in terms of the law.[17]

The court would have been required to develop the common law as may be necessary to improve the realisation and enjoyment of consumer rights generally.[18]

2.2.3 National Credit Act

A contract of lease may be described as an agreement by the lessor to let the use and enjoyment of a property in return for payment.[19] The National Credit Act describes “lease” as an agreement in terms of which the temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is

15 n 9.
16 Kerr *The Law of Sale and Lease* (2004) 245.
17 Freebody (n 9 above) 23.
18 s 8(2)(b).
19 n 14.

granted to or at the direction of the consumer; payment for the possession or use of the property is made on an agreed or determined periodic basis during the life of the agreement and interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.[20]

It is worth nothing that at the end of the term of the agreement, the ownership of the property either passes to the consumer absolutely or passes to the consumer upon satisfaction of specific conditions set out in the agreement.[21] The lease under discussion does not contain a provision that states that ownership of the property passes from the lessor to the lessee and, therefore, does not fall under the act. Further, the act does not apply in the circumstances of the case as section 8(2)(b) states that an agreement, irrespective of its form, is not a credit agreement if it pertains to an immovable property.

CHAPTER 3: DISCUSSION OF THE CASE OF *MOHAMED'S LEISURE HOLDINGS (PTY) LTD v SOUTHERN SUN HOTEL INTERESTS (PTY) LTD*

3.1 Facts of the case

On 1 November 2001 Southern Sun Hotel Interests (the respondent) as the lessee concluded a written lease agreement with Mohamed's Leisure Holdings (the appellant) as the lessor.[22] The parties agreed that the rental was payable no later than the seventh day of each month.[23] Accordingly, it was a material term of the agreement that should the respondent fail to pay the rental on the due date, the appellant would be entitled to cancel the lease and take possession of the property.[24] It has been established that the hotel has been operating its business for approximately 35 years without any interruptions, and

20 s 1 of the National Credit Act 34 of 2005.
21 n 16.
22 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA) par 4.
23 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 7) par 7.
24 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 20) par 5.

maintained regular and prompt rental payments after having instructed its bank to such effect.[25]

This continued until June 2014 when the respondent failed to make payment of the rental in time.[26] Subsequently, on the 20th of the month a letter was sent to the respondent by the appellant which afforded the respondent five days in which to remedy the breach. The appellant in the letter also warned that "should the respondent fail to pay the rent on the due date in future, no notice to remedy the breach would be given and the agreement will be cancelled forthwith and the respondent will be required to vacate the premises with immediate effect".[27] Although the respondent monitored its bank statements to ensure prompt payments, on 6 October the bank of the respondent failed to effect a credit transfer to the appellant's account on time even though the account had been debited before the due date.[28] The rent eventually was paid on the 20th of the month and the bank accepted responsibility for the delay.[29]

In response to the question of cancellation of the lease and the threatened eviction the respondent's attorney informed the appellant's attorney that cancellation of the lease was unreasonable as the breach had occurred due to its banker's error, and contended that the purported cancellation was contrary to the concepts of *ubuntu*, good faith and reasonableness.[30] It is worth nothing that the high court granted an order of eviction on the grounds that the implementation of the cancellation clause would be manifestly unreasonable, unfair and would offend public policy.[31] Therefore, the common law principle of *pacta sunt servanda* should be developed by importing or infusing the principles of *ubuntu* and fairness into the law of contract.[32] The supreme court of appeal held that the fact that a term in a contract is unfair or may operate harshly does not in itself offend the values of the Constitution and is not against public policy and, further,

25 n 22.
26 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 20) par 7.
27 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 7) par 13.
28 n 25.
29 n 21.
30 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 20) par 8.
31 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 7) par 27.
32 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 7) par 28.

that it is impermissible to develop the common law of contract by infusing the spirit of *ubuntu* and good faith so as to invalidate the term or clause in question. It was held that it would be untenable to relax the maxim of *pacta sunt servanda* as this would be tantamount to the courts concluding the agreement on behalf of the parties.[33]

3.2 Critical analysis of the decision of the high court

In the court of first instance it had to be determined whether in the circumstances of this case the implementation of the cancellation clause contained in the lease agreement would be manifestly unreasonable and would offend against public policy.[34] The court made a value judgment based on constitutional concepts and abstract values and held that the agreement did not in any way offend public policy nor were the terms invoked by the respondent to effect the cancellation of the agreement unreasonable, unfair or objectionable on any other grounds.[35] The court nevertheless refused to enforce a cancellation clause on the ground that implementing the clause would be contrary to the concept of *ubuntu*, in particular the notion of fairness implicit in the concept. The key to this approach is that it recognises fairness as an important part of the constitutional concept of *ubuntu*.[36] It follows that the unfair enforcement of a contract may be refused on the basis that it conflicts with a constitutional value.[37]

The essence of the contention put forward by Southern Sun was that the enforcement of the cancellation was unreasonable, the situation being unfair and against public policy.[38] It was advanced that public policy is informed by "the concept of good faith, *ubuntu*, fairness and simple justice between individuals" and that the common law principle of

33 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 20) par 19.
34 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 7) par 20.
35 Manolios (n 5) 28.
36 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 7) par 28.
37 Sharrock "Unfair enforcement of a contract and the constitutional norm of *ubuntu*: *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ)" 2018 *Obiter* 39, 218 and 219.
38 Manolios (n 5) 32.

pacta servanda sunt should not be treated as “an idea to be above criticism” but should rather be developed to uphold the *ubuntu* values of the South African people.[39]

The high court held that it was required to balance the late payment of the October rental, on the one hand, compared to the bank solely having to bear the blame for the late payment and the prospects of the disproportionate prejudice suffered in the event of eviction.[40] With reference to *Venter v Venter*[41] the court held that the position no longer is good in law because of the normative framework of the Constitution in developing the common law, and applied the value of *ubuntu* in order to conclude that an eviction order would offend constitutional values and that, therefore, the application must fail. Although it is suggested that a court may refuse to enforce a clause based on the ground of unfairness, it is uncertain whether this decision will be regarded as authoritative.[42] In the case under discussion there are two types of contractual relationships, namely, a contract of letting and hiring and a contract of agency.

The focus is on the former contract which entails that the lessor agrees that the lessee may have full or partial use or enjoyment of something for a certain period of time in return for the payment of a determined or determinable amount of money as rental.[43] The bill of rights does not deny the existence of other rights, but the main point is that the right to freedom has to be consistent with the bill of rights. It is worth noting that a precedent has been set in that, when courts apply the common law they must do so by developing and ensuring consistency with the values of the Constitution. This was the case until the supreme court heard the case. This somehow took one back to the strict application of the common law.

The principle endorsed in the case of *Barkhuizen v Napier*[44] is the following: a contractual provision that is in conflict with the values enshrined in the Constitution will be regarded

39 Manolios (n 5) 33.
40 *Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 7) par 35.
41 1949 1 SA 768 (A).
42 *Botha v Rich* 2014 4 SA.
43 Cornelius *Principles of the Interpretation of Contract in South Africa* (2016) 134.
44 2007 5 SA 323 (CC).

as contrary to public policy and consequently unenforceable. The constitutional court developed the public policy test into a two-stage approach in that a contract must not only be objectively reasonable but also be subjectively reasonable in the particular circumstances in order to be enforceable. In a majority judgment Ngcobo J stated that "[o]nce it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that, in the circumstances of the case there was a good reason why there was a failure to comply".[45] Ngcobo J went on to say that the Constitution required parties to honour contractual obligations that had been freely and voluntarily taken and that "while it is necessary to recognise the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of a clause if it would result in unfairness or would be unreasonable".[46]

In essence the constitutional court stated that the second subjective stage of the public policy test in terms of which a clause must not only objectively reasonable in order for it to be valid, but its effect must also be subjectively reasonable in the particular circumstances in order for it to be enforceable.[47] Southern Sun depended on *Barkhuizen* for its contention that once it had been proven that there were conditions that prohibited compliance with contractual provisions, demanding consistency would be unfair and unreasonable.[48] Southern Sun submitted that "the prejudice suffered by it would be far greater than the prejudice suffered by Mohamed's if the cancellation in terms of clause 20 was enforced".[49] The eviction of Southern Sun from the property it had occupied for the past 35 years would not only damage Southern Sun's reputation in the hospitality industry but would also lead to the loss of some 91 jobs.[50] Southern Sun therefore submitted that the principle of *pacta sunt servanda* should be relaxed and clause 20 should not be enforced."[51]

45 *Barkhuizen v Napier* (n 43) 58.
46 Manolios (n 5 above) 33.
47 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Interests (Pty) Ltd* (n 7) 15.
48 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 7) 19.
49 n 46.
50 As above.
51 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* par 19 and Manolios (n 5) 33.

In the case of *Mohamed's Leisure Holdings* the court stated that if the agreement s by all appearances was contrary to the constitutional values, the enforcement would not emerge. However, the enforcement of a *prima facie* innocent contract may implicate an identified constitutional value, but if the value is unjustifiably affected, the term will not be implemented.[52] The example used to illustrate Mathopo J's understanding was that of a term in a contract providing for the right of the lessee to sub-lease with the consent of the landlord.[53] The term itself does not offend public policy, but if the landlord withheld his consent to prevent the property being sublet in circumstances amounting to discrimination under the equality clause, the term would not be enforced.[54]

The same judge then turned to consider the facts of the *Mohamed's Leisure Holdings* case and applied the two-stage public policy test developed in the *Barkhuizen* case.[55] The following facts were considered to be of utmost significance: the fact that the terms of the agreement were not, on its substance, inconsistent with public policy; the relative position of the parties was one of bargaining equality; the parties could have agreed on a provision before the agreement was cancelled; and, finally, the timeous performance by Southern Sun certainly was feasible.[56] Southern Sun could have diarised well ahead of time to monitor this important monthly instalment and this could have influenced other methods of payment such as an electronic funds transfer.[57] Therefore, once it has been proven that there were conditions that averted consistency with the contractual provisions, demanding the consistency thereof would be absurd and uncalled for, according to the contention of the respondent.[58]

The precedent regarding the role of good faith in South African contract law remains the majority decision in *Barkhuizen*.[59] The court confirmed the supreme court of appeal position in *Brisley* that good faith has a creative, a controlling and a legitimating or

52 n 44.
53 As above.
54 As above.
55 Manolios (n 5) 34.
56 n 53.
57 As above.
58 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (n 7) 16.
59 *Barkhuizen* (n 44).

explanatory function and that "the concepts of justice, reasonableness and fairness constitute good faith".[60]

One of the views that was recognised in our legal system and which has brought perspective that influenced the advancement of contract law frequently at the inconsistency with the perspectives that of the Constitutional Court is that of Wallis, Justice of the court.[61] He has contended in his own and judicial capacities for an objective, contextual approach to the interpretation of commercial agreements, drawing extensively on the work of Lord Hoffmann.[62]

In one instance the decision in *Everfresh* had to be examined when advocacy, legal and, without a doubt, individual experience was under debate, featuring the way in which eviction essentially includes the lessee playing for time. This type of reasonable understanding, which is hard to infuse into a decision based on the literal interpretation of a written contract, is of exceptionally important relevance resolved from the surrounding circumstances and surely from "commercial common sense". It is difficult to debate that commercial law should reflect commercial practice and business norms.[63]

In contrast, a stronger role for human rights contemplation and more prominent development of the current customary law of contract, with the emphasis being placed on protecting the weaker party, was written by an academic at a South African university, Bhana.[64] His contentions feature the genuine situation of a large sector of the South African population that lacked education and literacy on finance or resources in order to contend on a level playing field with more resourced business contracting parties.[65]

60 *Brisley* (n 4).
61 Hutchison "Relational theory, context and commercial common sense: views on contract interpretation and adjudication" 2017 *SALJ* 296 and 315.
62 Hutchison (n 59) 316.
63 n 60.
64 As above.
65 As above.

The problem of inequality of bargaining power is a critical one which goes to the core of discussions around inappropriately acquired, mistake in contract formation, capacity to contract, validity and enforceability of contract.[66] These are circumstantial factors. The court has expressly called for more noteworthy subjective mindfulness in contract mediation, requesting that courts enquire as to who the parties to an agreement are and the conditions under which they contracted. This is a contention for social equity in contract law or, in other words, in the post-politically-sanctioned racial segregation contracting setting.[67]

Both schools of thought consolidate a greater role for context in contract adjudication, the only difference being that the former author focused more on consumers while the latter advocated commercial orientation.[68] In some instances where public policy already has an impact on the interpretation of contracts such as where the terms of an agreement exclude a party's liability in respect of wrongful acts committed in a contract, or where the general rule states that absurdities should be avoided in instances of cancellation of a statement or rather a clause of a contract, or covenants of restraints of trade or where the party endeavours to utilise a term for a reason other than that initially agreed upon.[69]

In *Wells v South African Alumenite Company*[70] it was stated that "[i]f there is one thing which, more than another, public policy requires, it is that men of full age in competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice".[71]

It has been stated that it has been established that the power to declare agreements contrary to public policy must be exercised with caution and only in instances where the case is neither vague nor ambiguous in order to avoid uncertainty in respect of the validity

66 As above.
67 As above.
68 n 59.
69 Cornelius (n 41) 65.
70 1927 AD 69.
71 n 36.

of a contract that stems from an indiscriminate abuse of power.[72] One should be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of proprietary and fairness.[73] The courts had always upheld that it is unacceptable to invalidate contacts due substantive unfairness because of the respect for the right to freedom and sanctity of a contract. This was the position before the precedent set by *Sasfin (Pty) Ltd v Beukes.* Evidently, since the decision in the latter case, in a number of cases the contractual terms have been struck down on this basis.[74]

3.2.1 Role of public policy

Public policy is dictated by courts based on values and norms that mirror the community's sense of justice and it is impacted by natural law, the 1996 Constitution, international law and comparative law.[75]

On the one hand, Jansen JA has stated that "to enforce a grossly unreasonable contract may in appropriate circumstances be considered as against public policy or *boni mores*".[76] On the other hand, Smalberger JA has stated that the power to declare a contract contrary to public policy should be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts results from an arbitrary and indiscriminate use of the power.[77]

As stated above, one should be careful not to conclude that a contract is contrary to public policy merely because its terms offend one's individual sense of propriety and fairness. This inevitably means that the doctrine should be invoked in circumstances in which the harm to the public is incontestable and this does not depend on inferences of a few judicial

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72 *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 94.
73 n 36.
74 Sharrock (n 12) 298.
75 Cornelius (n 41) 61.
76 *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A).
77 *Sasfin (Pty) Ltd v Beukes* (n 69) 9B-G.

minds.[78] In accordance with the case of *Standard Bank of SA v Wilkinson* the court stated that public policy can only be invoked in cases where the contract is so unreasonable that the harm to the public is substantially incontestable.[79] Although the law commission has previously proposed that courts be afforded the jurisdiction to amend or rescind a contract that, in its view, is unreasonable, unconscionable or oppressive, parliament has not reacted to such proposal.[80]

3.2.2 Fairness, reasonableness, *ubuntu* and good faith

Contractual fairness at best is a matter of applying doctrines such as good faith or conscionability.[81] Old Authority on Unfairness has adopted a clear position on the unfair enforcement of a contract, namely, that unfairness does not or cannot render the enforcement offensive to public policy.[82] The supreme court of appeal in the case under discussion has rejected the idea that good faith is an independent legal principle. The court's view is that good faith, reasonableness and fairness are no more than abstract values that perform creative, informative or controlling functions through established rules of contract law, and that the appropriate mechanism for judicial control of contract enforcement is public policy, not overlooking the fact that allowing judges to refuse to implement contractual provisions on the basis of unfairness will give rise to intolerable legal and commercial uncertainty.

Perhaps the most memorable instance was the use of "good faith" in interpreting the obligations of the parties in *SAFCOL v York Timbers*.[83] In this case the supreme court of appeal, despite taking a conservative stance on the role of good faith as not constituting an independently enforceable duty in contract law in one part of the judgment, nevertheless found York to be in breach of contract, due to its continued efforts to frustrate

78 *Fender v St John-Mildmay* 1937 3 ALL ER 402 HL 407 BC.
79 1993 3 SA 822 (C); see n 1.
80 See n 1.
81 Smith "The expanding circle of contract" 2016 *Stell LR* 232 227.
82 n 78.
83 2004 4 All SA 168 (SCA).

SAFCOL's exercise of its rights to adjust the terms of the contract.[84] This case represents a clear use of good faith in contractual interpretation to address an issue of a failure in bad faith to co-operate under a long-term relational contract.[85]

Existing doctrinal mechanisms such as interpretation (as in *SAFCOL* above), a refusal to award specific performance (as in *Haynes v King William's Town Municipality*), or supervening impossibility (for which the change of circumstances must be objective and absolute) are not fully capable of addressing all forms of hardship. A potential avenue of redress using a failed common supposition as to the future to render a contract void was cut short by the supreme court of appeal in *Van Reenen Steel (Pty) Ltd v Smith NO*.[86] It is hoped that the future development of the South African law of contract will find a way of dealing with this vital aspect of relational contracting.

Nevertheless, the constitutional court still has to give a final ruling on the role of good faith in contractual agreements.

Everfresh case[87]

If a court were to entertain the argument in *Everfresh*, the underlying notion of good faith in contract law, the maxim of the contractual doctrine that agreements seriously entered into should be enforced, and the value of *ubuntu*, which inspires much of our constitutional compact, may tilt the argument in its favour. A common law principle that renders an obligation to negotiate enforceable cannot be said to be inconsistent with the sanctity of the contract and the important moral denominator of good faith. Indeed, the enforceability of a principle of this kind accords with and is an important component of the process of the development of a new constitutional contractual order.

Good faith analysis:

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84 As above.
85 As above.
86 2002 4 SA 264 (SCA).
87 Hutchison (n 59) 316.

(a) *Purely commercial dispute:* Assuming that there is a standard of good faith applicable to the negotiation phase of contracting, the commercial nature of the agreement surely have should implications when determining what is reasonable in the context of the parties' dispute.

(b) *There is no deadlock-breaking mechanism: Southernport Developments* requires a method of resolving potential disputes during the negotiation phase for such a clause to be enforceable.

By the insertion of an arbitration clause by which disagreement could be authoritatively settled. Thus a duty to negotiate (in good faith) beyond the plain meaning of the provision must rest either on the implication of such a term into the contract or a development of the default rules of the common law of contract.

(c) I would argue that a clearer definition as to what constitutes good faith, or the related concept of *ubuntu*, is required in the interests of justice.

Good faith as a legally enforceable duty should best be determined objectively, with reference to the context of contracting. The test of what is a reasonable expectation in the context of the parties' relationship works well here.

Before the discussion of the decision of the supreme court of appeal, it is crucial to note and appreciate that the high court acknowledged the precedent set by *Venter v Venter*[88] where the bank was a mere agent of the tenant and the obligation to timeously make rental payment was the obligation of the tenant, and there was no legal obligation on the landlord to issue an “ultimatum” prior to cancelling the lease.

Moseneke DCJ stated that had the case been properly pleaded, a number of interlinking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with the constitutional values of *ubuntu*, which inspire much of our constitutional impact. The concept of *ubuntu* empahsises the communal nature of society and carries with in the ideas of humanness,

88 n 40.

social justice and fairness and envelopes the key values of group solidarity, compassion, respect for human dignity, a conformity to basic norms and collective unity.

In *Botha v Rich NO and Others* Nkabinde J stated that the principle of reciprocity falls within the understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Honouring a contract, therefore, cannot be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Therefore, good faith is the lens through which we come to understand contracts.

3.3 Criticism of the decision of the supreme court of appeal

This study is centred on the supreme court of appeal decision in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*[89] which is supported by the case of *Roazar CC v The Falls Supermarket CC.*[90] In the supreme court of appeal it is notable that Van den Heever JA in *Venter v Venter* stated that "[i]f the creditor must bear the consequences of *mora* where his health or the weather fails him, it seems to me not unreasonable that the debtor should bear the consequences where the bank fails him".[91] It is necessary to ensure that the outcome of any case does not depend on a personal sense of fairness and reasonableness as this leads to uncertainty in contractual enforcement. One of the main issues in this case is whether good faith is an independent substantive value embodying principles such as fairness, reasonableness and justice on the basis on which courts can decline the enforcement of a contract.

The respondent argued that the impugned clause should be interpreted to mean that parties to a contract ought to act in good faith, rendering the clause flexible to accommodate circumstances where a party is prevented by factors beyond its control from complying with the requirement of the clause.[92] It was also argued that because of

89 2018 2 SA 314 (SCA).
90 2018 3 SA 76 (SCA).
91 Sharrock (n 35) 225-226.
92 *Mohamed's Leisure Holdings* (n 7) 12.

the duration of the lease, the circumstances leading to the alleged breach (the fact that the appellant had no control over the bank's internal system) and the timeous efforts by the respondent to purge the default by ensuring that payments were made on time by monitoring its bank statements, it cannot be argued that the respondent adopted a supine attitude.[93]

In this respect the appellant contended that the clause is unreasonable because it insists on compliance with its provisions regardless of the circumstances that prevented compliance thereof.[94] Furthermore, the clause should be interpreted through the prism of the bill of rights in order to promote the spirit, purport and objects of the bill of rights.[95] However, the respondent submitted that the act of cancellation of the contract was *mala fide* as the appellant had failed to notify the respondent of the breach to enable it to rectify the non-payment within a short space of time. The respondent submitted that had this been the case, they could have rectified the error.[96]

This is where the balancing and weighing up of the principle of *pacta sunt servanda* against the constitutional values were necessary. As indicated above, the supreme court of appeal rejected the notion that values such as good faith are independent. No evidence was led that any of Southern Sun's constitutional rights had been infringed by the enforcement of the cancellation clause. It would have been incorrect, therefore, for the *pacta sunt servanda* maxim to have been relaxed. The cancellation of the lease agreement was upheld and Southern Sun was ordered to vacate the property.

One lesson one may learn from the above decision of the supreme court of appeal is that the courts are perhaps now intending to guarantee the consistent and coherent application of the freedom of contract doctrine, even having regard to the fact that injustices might ensue from its application. The question then arises as to whether this

93 *Mohamed's Leisure Holdings* (n 7) 13.
94 n 89 above.
95 s 39(2) of the Constitution of the Republic of South Africa, 1996.
96 *Mohamed's Leisure Holdings* (n 7) 20.

means that the values and the moral ethos of the constitution no longer are guaranteed in all other laws that are subordinate to the supreme law of the land.

I do not intend to be the voice that threatens the transformation and favour only traditional liberal notions of the common law, such as the principle of *pacta sunt servanda*, as this would inevitably mean that I enjoin the constitution in the legitimation of the unjust *status quo* in the law of contract.

3.4 Current legal position: the strict adherence of the doctrine of *pacta sunt servanda* without the influence of the constitutional abstract values

3.4.1 Doctrine of *pacta sunt servanda*

This doctrine stems from the constitutional values of dignity and freedom. Cameron JA stated that contractual autonomy is part of the liberty to regulate one's life by freely-engaged contractual arrangements.[97] The doctrine of *pacta sunt servanda*, also known as privity and sanctity of contract, entails that contractual obligations must be honoured where parties have freely and voluntarily entered into a contractual agreement. This notion goes hand in hand with freedom of contract which denotes that parties are free to enter into and decide on the terms of a contract. This principle is necessary because if the principle is overlooked, there would be an absence of integrity between the contracting parties.

The fact that parties freely and voluntarily enter into agreements gives effect to their constitutional right of freedom to contract. This is one of the reasons why our courts have time and time again upheld the principle. A failure by the courts to do so may lead to the imposition of the court's own sense of fairness and, as a result, the creation of a contract that was not initially agreed to or intended by the parties. In *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff*[98] Davis J held that "[w]ithout this principle, the law of contract would

97 *Brisley v Drotsky* (n 3) 38.
98 2009 (3) SA 78 (C).

be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties".[99] The fact that a term in a contract is unfair or may operate harshly does not in itself lead to the conclusion that it offends the values the constitution or is against public policy. It is not permissible for a court to develop the common law of contract by infusing the spirit of *ubuntu* and good faith so as to invalidate the term or clause in question. Where parties freely and voluntarily and with the prerequisite *animus contrahendi* agreed to negotiate in good faith and to conclude further substantive agreements that were renewable over a period of time, it is untenable to relax the maxim of *pacta sunt servanda* as this would be tantamount to the court creating the agreement for the parties. When a written contract is resolved on a general perception of the court, it demoralises its commercial usefulness.

3.4.2 *Roazar CC v The Falls Supermarket CC*[100]

It would be against public policy to coerce a lessor to conclude an agreement with a tenant it no longer wants. It is also difficult to conceive how a court, in a purely business transaction, can rely on *ubuntu* to import a term that was not intended by the parties.

3.4.3 *Brisley v Drotsky*[101]

It has been established that the constitutional abstract values are fundamental to our law. However, these values do not constitute independent, substantive rules that courts can employ to intervene in contractual relationships and, therefore, cannot be directly acted upon by courts. Although these values perform certain functions in our law, they cannot be directly acted upon. The court also held that courts can only interfere with contractual relationships if permitted by the rules of hard law but do not constitute hard law themselves. It is an accepted notion that judges can refuse to enforce a contractual

99 n 36.
100 n 87.
101 2002 4 SA 1 (SCA).

provision merely because it offends their personal sense of fairness and equity, which gives rise to intolerable legal uncertainty.

3.4.4 *Afrox Health Care Ltd v Strydom*[102]

The court confirmed the decision in *Brisley v Drotsky* and held that good faith, reasonableness and fairness do not constitute an independent basis for interference by courts with contractual obligations.

3.4.5 *South African Forestry Co Ltd v York Timbers Ltd*[103]

The court has no power to deviate from the intention of the parties, as determined through the interpretation of the contract, merely because it may be regarded as unfair to one of the parties. However, in the interpretation process the notions of fairness and good faith that underlie the law of contract once again have a role to play. While a court is not entitled to superimpose on the clearly-expressed intention of the parties its notion of fairness, the position is different where a contract is ambiguous. In this case the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith.

The Supreme Court of Appeal decision stated that "if there was one thing which, more than another, public policy requires, it is that men of full age in competent understanding shall have the outmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of Justice in *Wells v South African Alumenite Company* 1927 AD 69".

In *Bredenkamp v Standard Bank*[104] Ngcobo J stated that public policy importing notions of fairness, justice and reasonableness in the *Barkhuizen* case meant that these notions

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102 2002 6 SA 21 (SCA).
103 2004 54 ALL SA 168 (SCA).
104 2010 4 SA 468 SCA.

do not extend beyond instances where public policy considerations entrenched in the Constitution or elsewhere would be implicated. A lessee is bound to pay the proper amount of the rental on the due date and/or time and place stipulated or implied in the lease. A tenant who is *in mora* by paying the rental late has breached the contract regardless of whether it has made an effort to pay some days later.

The case of *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd*[105] dealt with instances where the right to cancellation arose and where parties have stipulated in the contract that time would be of the essence. Since the lease agreement in *Mohamed's Leisure Holdings* contained no obligation to serve a demand prior to a notice of cancellation of the lease agreement, it was unnecessary for the proceedings to be conducted in terms of section 32 of the Magistrate's Court Act. The notice of cancellation could have been effected by way of summons or any notice other than judicial procedure. The lessee bears the onus to prove payment if this is his defence.[106] In terms of banking practice payment is effected when the bank account of the creditor is credited with the amount as agreed upon.

In cases such as *Crown Restaurant* the court leaned towards the endorsement of the hemogenic ordering in our law that favours the principle of freedom of contract, thereby leaving a door open for potential role as part of the public policy test. Perhaps the common law has again surfaced here because in the aforesaid case the argument was that freedom of contract would not be enforced on the grounds of public policy.[107] Everyone has the freedom to enter into a contract with whomever he or she chooses, as long as the nature and the subject matter thereof fall with the parameters of the law.[108]

The fact that parties freely and voluntarily enter into agreements gives effect to their Constitutional right to freedom to contract. This is one of the reasons why our courts have time and again upheld the principle. A failure by our courts to do so may lead to an

105 2005 3 ALL SA 128 (W) at para 17.
106 *Ramnath v Bunsee* 1961 1 SA 394.
107 Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd 2008 (4) SA 16 (CC).
108 Christie *The Law of Contract in South Africa* (1991) 10-17.

imposition of the court's own sense of fairness and, as a result, the creation of a contract that was not initially agreed to or intended by the parties. In *Mozart Ice Cream Franchise (Pty) Ltd v Davidoff*[109] Davies J held that without this principle the law of contract would be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Post-Constitutional Legislation

The need for constitutional transformation of the law stems from section 39(1)(a) which provides that a court, tribunal or forum, when interpreting the bill of rights itself, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom when it comes to the interpretation of the bill of rights itself. The relevance of the application of the constitution lies in the direct horizontal application of the bill of rights, especially the law of contract with reference to the *boni mores*, good faith and public interest if and when there are any rights that clash and have to be weighed against each other.

I submit that the court ought to reassess its approach to constitutional values, in general, and the importance of the liberal notion of freedom of contract, in particular. It is about time the Constitution of the Republic of South Africa provided an opportunity to develop the common law to give reconciliation to the reality of the changing and dynamic society and its values. This entails that there is an urgent need for a shift to democratising the law of contract, to end the feudalistic link that persists in landlord-tenant relationships.

I agree perhaps one definitive solution is to have a statutory requirement for standard terms in contracts based on fairness and reasonableness. The influence of the constitution in respect of the law of contract implies that the mere reliance on freedom of

[109] 2009 3 SA 78 (C).

contract as the basis of contractual relationships will not suffice, neither will an interpretation of a contract that attempts to legitimise liberal ideology. Therefore, a review, adaptation, reinterpretation and expansion of the traditional *boni mores*, public interest and good faith are necessary in order to align these notions with the new values and principles in the constitution.

In *South African Forestry Co Ltd v York Timbers Ltd*[110] Brand JA explained the basis of the principle as follows:

> "Although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly."[111]

Sasfin (Pty) Ltd v Beukes[112] and subsequent appeal court cases make it clear that a term, or an entire contract, may be so unfair as to be contrary to public policy. Therefore, merely because reasonableness and unfairness are abstract values does not mean that they cannot be determinative of public policy on a particular issue. This means that if a point can be reached where substantive unfairness is offensive to public policy, then surely a point can be reached where the enforcement of a valid provision becomes sufficiently unfair to be offensive to public policy. The court also warned that one must be careful not to conclude that a contract is contrary to public policy merely because its terms offend one's individual sense of propriety and fairness.[113]

The development of our contract law thus far has been shaped by colonial legal tradition represented by English law, Roman law and Roman-Dutch law, regulating the environment within which trade and commerce takes place. This approach places a

110 n 103 par 27.
111 Sharrock (n 12) 219.
112 1989 1 SA 1 (A).
113 *Mohamed's Leisure Holdings* (n 7) 22.

higher value on negotiating in good faith than would otherwise have been the case.[114] While still focused on the case of *Mohamed's Leisure Holdings,* the court once again held that ultimately one had to strike a balance between the law of contract and the value of *ubuntu*.

In the judgment of *Beadica 231 CC v Trustees, Oregon Unit Trust*[115] Davis J contended that the if honouring a contract was not merely a matter of each side pursuing his or her own self-interest and that if that is not the exclusive lens through which the our contract law should be evaluated, then in order to promote a more nuanced focus, the fact that the applicants faced a real prospect that their business would close down and their franchise agreements would inevitably be terminated, being an all-black business as part of the BEE transaction, the court's decision was in favour of the applicants who had failed to adhere to a provision of the contract and exercised their right to renewal of contract.

The court further stated that where legal certainty is said to be undermined if the enforcement of contractual obligations is to be independent upon a judicial sense of reasonableness, fairness and good faith rather than in terms of the contract, legal change may introduce a rule of law for the protection of many people without the detrimental consequences suggested. The judge further stated that this approach should not necessarily be followed where the consequences of the breach of a contract was reasonably foreseen and the remedy was appropriate.

4.2 Conclusion

Sharrock, a professor of law, once asked what particular standards are to be connected to guarantee that the result in a specific case does not rely on individual quirks of the individual judge and to keep uncalled-for implementation from turning into a "final resort" safeguard of the "refractory and generally exposed" account holder. This stems from the statement of the court in which it stated "that the enforcement of a contract may be so

114 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).
115 2018 1 SA 549 (WCC).

unfair as to be contrary to the value of *ubuntu*".[116] Clearly, if rules or standards are not recognised, this will no doubt lead to uncertainty of the law, with judges choosing cases as indicated by their individual sense of fairness and reasonableness. Realistically, only for the present purposes and because of the doctrine of *stare decisis,* courts need to follow the law that has been set before in respect of substantive fairness of contractual provisions appropriately altered to address unfair enforcement.[117]

In *Brisley v Drotsky* the majority opinion of the court envisaged that the courts would have to adopt this approach if the "*Sasfin* principle" were broadened to prevent the enforcement of contractual provisions that are not *per se* contrary to public policy.[118] The one approach that may formulate certain general principles and provide certainty in our law is the approach known as the "*Sasfin* principle" which has been developed to prevent the implementation of contractual provisions that are not *per se* contrary to public policy. This means that a court may reject the enforcement of a contractual term based on unfairness only if the enforcement ultimately would be contrary to public interest.

In the first place, I concur with the *Sasfin* case where it was stated a the judge must take care not to conclude that enforcement would be contrary to public policy merely because it would offend his or her individual sense of fairness.[119] The court must exercise its power to refuse enforcement sparingly, and only in cases in which the element of public harm is manifest.[120] Also, the circumstances must be such that enforcement would be "exceptionally unfair".[121] Indeed, I concur with the statement that to give judges a discretionary power beyond this could create considerable legal and commercial uncertainty.[122]

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116 *Donelly v Barclays National Bank Ltd* 1990 1 SA 375 (W) 381.

117 In cases such as *Sasfin (Pty) Ltd v Beukes* (n 69), *Botha (now Griessel) v Finanscredit (Pty) Ltd* , and *Standard Bank of SA Ltd v Wilkinson* (n 77).

118 Lubbe "Taking fundamental rights seriously: The bill of rights and its implications for the development of contract law" 2004 *SALJ* 395 412, 418-19; Glover "Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*?" 2007 *SALJ* 449 457.

119 *Sasfin (Pty) Ltd v Beukes* (n 69) 8.

120 *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 6 SA 66 (SCA) par 23.

121 n 110.

122 *South African Forestry Co Ltd v York Timbers Ltd* (n 81) par 27;.

Therefore, the solution to deciding whether enforcement would cause manifest public harm is for the court to consider the interests of the community as a whole, and not merely the interests of the individual parties to the contract or a few members of the community.[123] Furthermore, the court should avoid attaching too much weight to the interests of the party that would be adversely affected by the enforcement. Assessing fairness as between the contracting parties requires the court to consider the matter from the point of view of each party.[124] It is clear from *Mohamed's Leisure Holdings* that matters that are relevant to determining whether enforcement would be unfair are to include whether the party in breach was aware of the breach or could have prevented it from occurring, and the prejudice either party will suffer if enforcement is or is not granted.

Nevertheless, from the above discussion it may be adduced that the implementation of a contractual provision that is valid may not be offensive to public policy if it can be justified in the broad commercial context in which it is sought. This generally boils down to determining whether the creditor, having regard to the circumstances that already exist or which may arise in the future, has a sound commercial reason for wanting to enforce the provision in question.[125] In my opinion the approach followed by the court in *Mohamed's Leisure Holdings*, the supreme court of appeal decision, is correct. The decision supports the notion that when entered into freely and voluntarily, contractual obligations must be honoured by the parties. I contend that a party's freedom to contract also is a right that needs to be appreciated by contracting parties themselves as much as it is a constitutional right that is worthy of protection by the courts.

Second, I support this argument by recommending that there is a need for legislative protection for the parties that is not necessarily included in the above-mentioned acts that apply only to certain consumers. The recognition of the remedy of a reduction in the rental for a lessee that has received partial use and enjoyment of the leased object is not sufficient. There is a need for the adoption of the Control of Unreasonableness,

123 *Standard Bank of SA Ltd v Wilkinson* (n 77) 827-832.
124 *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) par 65.
125 *Standard Bank of SA Ltd v Wilkinson* (n 77) 832-837.

Unconscionability, or Oppressiveness in Contracts or Terms Act that was recommended by the law commission. The appropriate way in which to address the problem of changed circumstances at common law has not yet been considered by the constitutional court. There currently is no particular principle to ease the hardships because of changed circumstances in the law of agreement.

4.3 A new precedent set for subsequent court decisions

In 2018 a new case, *Roazer CC v The Falls Supermarket CC*,[126] was decided by the supreme court of appeal where the court stated that good faith negotiations could not be granted because the respondent had failed to notify the appellant of its intention to exercise the option to renew the lease agreement timeously as per the provision of the contract. The court held that in a purely business transaction the court cannot rely on the principle of *ubuntu* to import a term that was not intended by the parties and to deny the other party the right to rely on the terms of a contract.

Therefore, the court upheld the sanctity of a contract to which parties had consciously bound themselves, thereby promoting the common law principle of *pacta sunt servanda*. It therefore is important to ensure that one is fully acquainted and comfortable with the terms of the contract that one is signing. It appears that the courts are becoming unwilling to be lenient and to allow the parties to a contract to rely on principles such as good faith and *ubuntu*, and that they will not import terms into a contract that are not present or relevant on the face of it. Furthermore, the court contented that it is not competent to import a term not intended by the parties based on the principles of *ubuntu*.

In conclusion, if a contract is *prima facie* contrary to constitutional values, questions of enforcement would not arise. However, the enforcement of a *prima facie* innocent contract may implicate an identified constitutional value, and if the value is unjustifiably affected, the term will not be enforced. It is important to consider the fact that the terms of this contract were not *prima facie* inconsistent with public policy; the relative position

[126] 2018 1 ALL SA 438 (SCA).

of the parties was one of bargaining equality; the parties could have negotiated a clause in terms of which Southern Sun was given notice to remedy a breach before the contract was cancelled; and the timeous performance Southern Sun could have diarised well ahead of time to monitor this important monthly payment and it could have effected other means of payment such as an electronic funds transfer.

I agree with the approach adopted by the court in *Mohamed's Leisure Holdings*. A contractual party's freedom to contract is not only a constitutional right but is also a right that should be respected by the contracting parties themselves. The decision supports the notion that when a contract is entered into freely and voluntarily, contractual obligations must be honoured by the parties. However, the constitutional court in *Barkhuizen* stated that there is a need to strike down the unacceptable exercise of freedom to contract and that any clauses that were found to be against public policy should not be enforced by the court.

It is safe to conclude that, as in the past, the supreme court of appeal has re-endorsed the notion that people should always be allowed to contract as they wish, whether or not the terms operate unfairly or harshly against one party, because the court is eager to perpetuate the fiction that in most cases parties to contracts have equal bargaining power. The only difference is that as stipulated in the *Roazer* and *Mohamed's Leisure Holdings* cases. It is important to note that these cases do not intend to portray the supreme court of appeal as reluctant to subject the law of contract to the discipline of the constitution. Whether or not one agrees with the majority decision of the supreme court of appeal in the case of *Mohamed's Leisure Holdings*, this case represents a decisive shift in the law of contract and substantially upholds the notion of freedom of contract.

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